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The Case Against the Polygraph

The polygraph, commonly known as the lie detector, is an unreliable instrument by which to conclude whether a person is being truthful, Mr. Burkey asserts. Despite this unreliability and the lack of adequate professional training found in most polygraph technicians, the operators of commercial polygraph laboratories have been pushing its use as a test for employment. The author declares that this use of the polygraph violates personal rights and should be curtailed.

by Lee M. Burkey • *of the Illinois Bar (Chicago)*

PUBLIC ATTENTION frequently has been drawn to the polygraph through press reports of its use by law enforcement agencies or by politicians who propose it be used to settle disputed points of fact arising from the fervor of political debate. Interest has been heightened recently by the efforts of organized labor to ban its use in industry.

The polygraph, better known as the lie detector, is an electronic device that, on being applied to the human body, graphically records blood pressure, pulse, respiration and perspiration. Its use as an investigative technique is based on these assumptions: (1) that lying leads to conflict, (2) that conflict causes fear and anxiety, (3) that this mental state is the direct cause of measurable physical changes that can be accurately recorded on the polygraph and (4) that the polygraph operator by a study of these reactions can tell whether the subject is being deceptive or truthful. None of these assumptions is wholly true. Even the most enthusiastic supporters of the polygraph readily concede that errors are made.

Since efforts were first made to introduce lie detector results in evidence, the great majority of state and federal courts, believing the method to

be scientifically unreliable, have refused to permit them to be introduced either in criminal or civil proceedings.¹ With few exceptions,² courts have also denied admission of test results even though the parties have stipulated to their use.³ Illinois, by statute, not only forbids the court's requiring that a litigant submit to a lie test in any civil trial or pretrial proceeding,⁴ but in a criminal trial also forbids the court's making such a suggestion.⁵

Commercial Operators Sell Polygraph's Use

Commercial polygraph interests, finding their methods rejected by the courts, have nevertheless continued to foster the myth that the polygraph is an extremely accurate, if not infallible, method of getting at the truth. A vigorous campaign has been waged in the last decade among employers to secure its adoption as a supplement to other traditional methods of plant security. The result is that more and more employers, assuming that use of the polygraph is an efficient and relatively simple method of stopping thefts within the plant, are requiring their employees to take the tests. Some employers also subject all job applicants to a pre-employment screening that includes a polygraph examination. It has been

estimated that there are now approximately 3,000 polygraph operators in the United States who give between 200,000 to 300,000 tests each year. In 1963 the United States Government alone gave over 19,000 tests.

Unlike suspects taken into custody by the police, who may not have lie tests used against them in judicial proceedings, employers with no evidence other than the test results frequently discharge employees suspected of unlawful conduct. As the loss of a job under these circumstances means the loss of reputation and may effectively bar a worker from future employment, it is no surprise that labor opposes its use. At first labor's opposition was expressed only by contending in labor arbitration proceedings that under a labor contract an employer did not have "just cause" for the discharge of an employee when the evidence of wrongdoing was based solely on the employee's failure to pass a lie test or on his refusal to take one. Most arbi-

1. *Frye v. United States*, 293 Fed. 1913 (D.C. Cir. 1923).

2. *People v. Houser*, 193 P. 2d 937 (Cal. 1948); *State v. McNamara*, 104 N. W. 2d 568 (Iowa 1960); *State v. Valdez*, 371 P. 2d 894 (Ariz. 1943).

3. *LeFeuvre v. State*, 8 N. W. 2d 288 (Wis. 1943).

4. ILL. REV. STAT. ch. 110 § 34.1.

5. ILL. REV. STAT. ch. 38 § 736.2.

trators have agreed.⁸ Administrative bodies, such as civil service commissions, unemployment compensation boards of review and the National Labor Relations Board, after some hesitancy, are also taking a similar position.⁹

Concurrently with these developments, labor groups at local and state levels also have sought legislation forbidding the use of the lie detector either on employees or job applicants. Six states now forbid the imposition of polygraph tests on employees by employers as a condition of employment¹⁰ and similar legislation is being considered by the legislatures of several others. Early this year polygraph testing suffered another setback when the Executive Council of the American Federation of Labor-Congress of Industrial Organizations initiated a national campaign to prohibit the use of the lie detector in labor relations.

In response to the criticism implicit in the opposition of organized labor, the proponents of lie detectors are trying to raise qualifications of polygraph examiners, whose standards are still so deplorably low that one authority, Fred E. Inbau, professor of law at Northwestern University, has publicly stated that 80 per cent of the polygraph operators are not qualified to interpret the results.¹¹ Of the three states now requiring licensing of polygraph operators, Illinois has adopted what is regarded as a model act. Under it a polygraph operator must have "an academic degree at least at the baccalaureate level" and have "satisfactorily completed not less than six months of internship".¹² Because this act permits persons who have administered "detection of deception examinations for a period of two years" prior to the passage of the act to continue to do so, it is obvious that many years must pass before the unqualified are eliminated. Furthermore, it is doubtful that the act really upgrades the standards of examiners, for the mere possession of an academic degree does little, if anything, to qualify an operator unless the degrees are advanced ones in the physiological or psychological sciences.

Despite growing public interest in the subject, few impartial studies have been made on the validity of poly-

graphic investigation, probably because of the difficulty in checking the results against irrefutable extrinsic facts. The suspect who beats the lie box does not say so, and even confessions themselves are frequently misleading, as those experienced in criminal investigation know. Several years ago a Chicago judge bitterly criticized a nationally known polygraph firm for obtaining a confession from a 13-year-old boy that he had set fire to a school, thus causing the death of nearly a hundred people. The judge rejected the confession as inconsistent with all the other evidence in the case. Unlike the cardiograph and other techniques for diagnosing illness, the validity of which can be verified by autopsy, there is no independent means of confirming whether a person who is cleared or condemned by the polygraph has or has not told the truth.

Illustrative of the hazards of the polygraph to the emotionally disturbed is a report in the *American Journal of Psychiatry* of a young bank officer who, while taking a routine lie test, violently reacted to questions about ever having stolen money from the bank or its customers. Believing that the polygraph could not be wrong, he confessed to thefts that subsequent audits revealed had not taken place. Finally, on receiving psychiatric treatment, he was found to have deep guilt feelings about his wife and mother, both of whom were bank customers. The psychiatrists who examined him criticized the polygraph examiner, saying:

Psychological factors other than conscious deception causing deviant autonomic responses include such situations or stimuli that produce frustration, surprise, pain, shame, embarrassment, etc. Some of these stimuli (e.g. startle and pain) are almost universal (though there are some exceptions), whereas others (frustration, shame and embarrassment) tend to be more idiosyncratic. The polygraph examiner may not, and the commercial operators usually do not, know enough about their clients to evaluate these idiosyncratic factors. This aspect is even more complex when the client is, himself, unconscious of the emotional quality of the stimuli.¹³

The Warren Commission likewise concluded that physiological responses

due to factors other than deception, such as fear, anxiety, neurosis and other emotions, had to be given consideration in evaluating the polygraph.¹⁴

A team of professional psychologists who had been engaged in extensive research on polygraph techniques and the claims of commercial operators recently came up with this startling conclusion:

... there exists no public body of knowledge to support the enthusiastic claim of operators. There are no publications in reputable journals, no facts, no figures, tables or graphs. In short, there is nothing to document the claims to accuracy or effectiveness except bald assertions.¹⁵

They reported that the only adequately controlled studies of the effectiveness of the lie detector that have been made by physiological psychologists indicate that the degree of success is close to 70 per cent—a much lower figure than the usual 95 to 99 per cent estimate made by the commercial polygraph operators.

If the lie detector is wrong three out of ten times, it certainly carries a margin of error that justifies the continued reluctance of the courts to permit its use and that explains labor's strenuous effort to ban its use in industry.

Congressional Hearings Result in Criticism

Extensive hearings on the use of the polygraph were held in 1964 by a subcommittee of the Committee on Government Operations of the House of Representatives, under the chair-

6. For representative cases, see General American Transportation Corporation, 31 Lab. Arb. 355 (1958); B. F. Goodrich Company, 34 Lab. Arb. 552 (1961); Continental Air Transport Company, 38 Lab. Arb. 778 (1962); Louis Zahn Drug Company, 40 Lab. Arb. 352; Leg Drug Company, 39 Lab. Arb. 1121 (1943).

7. *Stape v. Civil Service Commission*, 172 A. 2d 161 (Pa. 1961); *Swope v. Florida Industrial Commission*, 159 So. 2d 653 (Fla. 1964); *Lone Star Company*, 149 N.L.R.B. No. 67 (1964).

8. Massachusetts, Oregon, California, Rhode Island, Alaska and Washington.

9. Hearings Before the Subcommittee of the House Committee on Government Operations ("Use of Polygraphs as 'Lie Detectors' by the Federal Government"), 88th Cong., 1st Sess. pt. 1, at 8 (1964).

10. *U.S. Rev. Stat.* ch. 34 § 961.

11. Dearman & Smith, *Unconscious Motives and the Polygraph Test*, *Am. J. PSYCHIAT.* 107 (May, 1963).

12. *REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY* 813 (official ed. 1964).

13. Sternbach, Gustafson & Collier, *Don't Trust the Lie Detector*, *Harvard Business Review*, November-December, 1962, page 127, 130.

manshship of Congressman John E. Moss of California, after the propriety of the polygraph operators was questioned. When those hearings were concluded, the committee issued a scathing report in which it said there is no such thing as a "lie detector".¹⁴ This view seems to coincide with that of J. Edgar Hoover, Director of the Federal Bureau of Investigation, who in connection with the Ruby investigation made this comment:

It should be pointed out that the polygraph, often referred to as "lie detector" is not in fact such a device. . . . The FBI feels that the polygraph technique is not sufficiently precise to permit absolute judgements of deception or truth without qualifications.¹⁵

The Committee on Government Operations emphasized that many physical and psychological factors make it possible for an individual either to beat the polygraph when guilty or to fail to pass it when innocent. It also decried the fact that the polygraph technique forces an individual to incriminate himself and often to confess to past conduct not pertinent to the original purpose of the examination.¹⁶

One distinguished authority, after careful analysis of the theory of lie detection by polygraph, has said: "There seems to be little evidence that upholds the claim to a regular relationship between lying and emotion; there is even less to support the conclusion that precise inferences can be drawn from the relationship between emotional change and physiological response." He added that because of these basic theoretical limitations he saw "little reason for supposing that a test with very high unconditional accuracy will ever be developed".¹⁷

To the frequent suggestion that suspects should be permitted "voluntarily" to take lie tests, the committee replied that as long as notations are made in any official file on an individual that he has refused to take a polygraph test, the examination is in no sense "voluntary".¹⁸ All too often a refusal to take the test is regarded as additional evidence of guilt. It is obvious, though, that none of the defects of the polygraph method are overcome

merely because a person voluntarily submits to it. The innocent volunteer may rue his naivete when the results are released.

Use by Employers Cannot Be Justified

No doubt the polygraph will continue to be regarded in some quarters as a valuable investigative aid, particularly when it evokes confessions from those who believe in its infallibility, but its use by civil authorities and employers, to the exclusion of a sound and thorough investigation of extrinsic facts, cannot be justified. The argument advanced by advocates of the use of the lie detector that to resist its use is to protect the guilty becomes specious once the defects of the machine and the false assumptions of the method are recognized.

The delicate problem of balancing the protection of property against the preservation of human rights will become more urgent as Americans seek to combat the increase in crime, but if the price of its reduction is the destruction of innocent men, the price is too great. The reason for our concern for the rights of the innocent was never better explained than by that staunch lawyer-patriot, John Adams, when in defense of the British soldiers involved in the Boston massacre he reminded the jury that in their zeal to punish the guilty they should not disregard their duty to protect the innocent, and said:

. . . it may be proper to recollect with what temper the law requires we should proceed . . . we find it laid down by the greatest English judges . . . we are to look upon it as more beneficial that many guilty persons should escape unpunished than one innocent person should suffer. The reason is because it is of more importance to the community that innocence should be protected than it is that guilt should be punished.¹⁹

Why Lie Test Results Are Not Evidence

The courts, arbitrators and administrative bodies have usually justified their refusal to admit lie test results in evidence for the following reasons:

1. The machine's operation and interpretation depend wholly upon the



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skill of the operator, many of whom have little or no training in either the psychological or physiological sciences.

2. The emotional state of a sensitive person may render the test less accurate or in some instances useless.

3. The machine itself is not free from error.

4. There is no conclusive proof that a physical response correlates with the mental state of the subject.

In addition to finding the polygraph to be an essentially unscientific and unreliable investigative method, many recent administrative decisions also hold that its use violates the right of privacy and the right against self-incrimination. If these decisions are any guide, emphasis will probably continue to shift from science to civil rights in future cases.

14. H. R. Doc. No. 198, 89th Cong., 1st Sess. 13 (1965).

15. WARREN COMMISSION REPORT, op. cit. supra note 12, at 815.

16. H. R. Doc. No. 198, 89th Cong., 1st Sess. 12, 19, 20 (1965).

17. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L. J. 694, 728, 727 (1961).

18. H. R. Doc. No. 198, 89th Cong., 1st Sess. 20 (1965).

19. I. SMITH, JOHN ADAMS 124 (1962).